In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1147

MICHAEL BENJAMIN WEISSMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in the United States District Court for the Eastern District of Missouri of wilfully tearing his draft registration certificate into two pieces in violation of Section 462(b)(3) of the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3)). He was sentenced under 18 U.S.C. 4208(b), which provides for tentative imposition of the maximum sentence (five years and a fine of $10,000 in this case) pending receipt of the study and report authorized by that statute, after which the sentence is finally determined. As permitted by the decision in *Corey* v. *United States*, 375 U.S. 169, petitioner appealed his conviction before the final determination of sentence.

413-990—71

The court of appeals affirmed the conviction (Pet. App. A).

The legal issues raised in the petition are fully answered by the opinion of the court below. The essence of the petition is, we believe, an appeal to this Court to supersede the prosecutive judgment to seek an indictment, relief that is plainly not available here.

Petitioner argues that the destruction of his draft card did not interfere significantly with the Selective Service process, particularly since he sought a new card shortly after it was destroyed. To be sure, no single draft card in isolation is essential to the operation of the Selective Service system, but, as the Second Circuit said in *United States* v. *Miller*, 367 F. 2d 72, 81, certiorari denied, 386 U.S. 911, "proper functioning of the system depends upon the aggregated consequences of individual acts." This Court in *United States* v. *O'Brien*, 391 U.S. 367, 381, rested its decision on the ground that the continuing availability to registrants of their Selective Service certificates is important to the smooth and proper functioning of the Selective Service system. When petitioner tore his card in half and handed it to the plainclothesman, he was deliberately making it unavailable for the intended purpose protected by the statute—as his subsequent letter seeking a replacement attested (see Pet. App. A–6)—and it was only the plainclothesman's action that preserved it. Even his subsequent decision to ask for a replacement did not cure the inconsistency of his act with the needs of

the system; if numerous registrants did so, the administrative burden would be substantial.

Although the prosecutor's decision in this case is plainly not under review here, the time when it was exercised and the circumstances of petitioner's act are pertinent factors in any consideration of that decision. The publicity given to petitioner's act—not his views—was reasonably thought to create a risk of widespread imitation. Moreover, petitioner's request for a duplicate card gave no evidence of contrition.

The case involves no legal question appropriate for review by this Court. Further proceedings with respect to sentence remain open in the district court.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

---

*Upon receipt of the study provided for in 18 U.S.C. 4208(b)—after a three-month commitment for that purpose, subject to a three-month extension if necessary—the district court will consider the sentence further, and may (under section 4208(b), or under Rule 35, F.R. Crim. P.) reduce both the 5-year term and the $10,000 fine tentatively imposed.

U.S. GOVERNMENT PRINTING OFFICE: 1971